

LEGAL EFFORTS OF EXECUTION APPLICATION AGAINST JOINT TREATMENT DECISIONS

by Tinuk Cahyani

Submission date: 13-May-2020 02:48PM (UTC+0700)

Submission ID: 1323178171

File name: LEGAL_EFFORTS_OF_EXECUTION_APPLICATION_AGAINST.pdf (676.68K)

Word count: 9254

Character count: 44921

**LEGAL EFFORTS OF EXECUTION APPLICATION AGAINST
JOINT TREATMENT DECISIONS**

(Study of the Implementation of Decisions on the Decisions of Religious
Courts Number: 0701 / Pdt.G / 2014 / PA.Mlg)

Tinuk Dwi Cahyani
Universitas Muhammadiyah Malang
tinuk_cahyani@yahoo.com

Abstraction

Case Number: 0701 / Pdt.G / 2014 / PA.Mlg is the product of the Malang Religious Court which has permanent legal force. In fact, after the ruling gets permanent legal force, it is known that the parties have a joint debt which causes problems for the parties who are responsible for paying off the joint debt if the decision only regulates the share of each of these assets. The problems in this study are: 1) The judge's decision regarding the division of joint assets in terms of legal certainty and justice in the decision Number: 0701 / Pdt.G / 2014 / PA.Mlg. 2) The implementation of sharing the shared assets 3) The implementation of shared debt division if there is no decision by the judge, in fact there is a joint debt. The author uses an empirical juridical research method located in the Malang Religious Court. Primary data is obtained by interviewing the Head and the Registrar of the Malang Religious Court and the Judge who handled the case Number: 0701 / Pdt.G / 2014 / PA.Mlg and the secondary data is obtained from research and literature review which consisted of laws and other legal materials which are relevant.

Regarding the opinion of the Panel of Judges on the decision of 0701 / Pdt.G / 2014 / PA.Mlg it can be learned from legal considerations in the a quo decision. In general, the principles of justice and legal certainty must be upheld. Justice must be upheld in accordance with the provisions of Article 35 to 37 of Act Number 1 of 1974 concerning Marriage, Article 85 up to Article 97 of the Compilation of Islamic Law.

Keywords: Legal Efforts, Execution, Joint Assets, Religion Court

INTRODUCTION

A. Background

A legal relationship between a man and a woman which is tied in marriage forms a household, which has the hopes and aims as written in the Constitution No. 1 year 1974 regarding Marriage, which is to form a family

which is *sakinah, mawaddah wa rahmah* (tranquil, filled with hope and love). The aim of a husband and a wife in forming a household is to maintain those hopes forever, until death sets them apart. Yet, the household journey of a husband and a wife does not go without challenges and tests. There are those whose marriages are able to last and that they are able to reach the aims of marriage until death does the part, yet there are also marriages which end in divorce¹.

There are different consequences which follow the breaking of the marriage ties which have different causes. If the marriage tie is broken with the death of one of the partners, thus the consequence is the division of the will, where the widow or the widower are heirs of the deceased. If the marriage is broken by divorce, and if they co-owned some wealth, thus there will be a division of the wealth they co-owned. The rights of each of the ex-husband and the ex-wife regarding the co-owned wealth must be resolved as they are not tied in a marriage tie anymore. The co-owned wealth of the ex-husband and the ex-wife is what will be discussed by the researcher, including the co-owned debt during their marriage for the interest of the family

The Compilation of Islamic Rulings state that the breaking of the marriage ties between husbands and wives may be caused by *talak* divorce in which the pleader is the husband, or *khuluk* divorce in which the pleader is the wife. *Talak* and *khuluk* have different legal consequences. The breaking of the ties of marriage is also regulated by the Compilation of the Islamic Rulings (KHI). There are court rulings which have a legal power regarding marriage. The judge may decide if a marriage has ended. In the Constitution regarding marriage as well as the KHI, there are no strict description of rulings regarding the sense and the breaking of marriage ties which are obtained from the court, including the difference between the breaking of the marriage ties caused by divorce and that which is caused by the court. Yet, if it is implied that the court decision is a divorce, yet, divorce has been

¹ Indah Purbasari, *Hukum Islam sebagai Hukum Positif Di Indonesia*, Malang: Setara Press, 2017, hal. 128-129

mentioned before as a cause of breaking the marriage ties. Thus, this can mean that the breaking of marriage caused by the court decisions may happen if a woman pleads to the court so that her marriage can be decided as broken if the husband is gone (*ghoib*). If this case happens, the mechanism is not included as a lawsuit, but as a plea as it is done one-sidedly by the wife. Yet, the religious court's procedural law in the Republic of Indonesia's Constitution No. 7 year 1989 regarding the Religious Court only regulates the mechanism on the procedures of the *gugat*, *talak*, and *li'an* divorce cases.²

In Islam, divorce is regarded as one of the solutions if there is a conflict in the household caused by continual fights which pose no resolutions. For example, either the husband or the wife finds a new partner, and that he/she chooses another person to become his/her partner; or a husband does not undergo his responsibilities even though he is a man who has the ability to provide for his wife and children; or other causes which may cause the relationship between the husband and the wife filled with hatred, even though they started their marriage with love.³ This means that divorce is an emergency exit which may be taken by the husband or the wife. If the aims of the marriage cannot be reached anymore, and that there is more harm than good if that marriage is continued. This emergency exit may be taken if the household feels like hell because the husband or the wife cannot cooperate anymore, though the main aim of the household is to make the home like paradise.

In the Indonesian language, *perceraian* is a common term used to describe *talak* which comes from the word "*ithlaq*" which means leaving or letting go. Leaving or letting go of the marriage ties have the same meaning as breaking the relationship between the husband and the wife. In Islam, the rulings regarding divorce seem to cause some misunderstanding, which makes it seems like men have more power over women. But actually, the Islamic rulings have equal rights for men and women. This also applies for

² Ibid, hal. 130

³ Aulia Muthiah, *Hukum Islam: Dinamika Seputar Hukum Keluarga*, Yogyakarta: PT. Pustaka Baru, 2017, hal. 104

marriage, where the man and the woman carry the same burden to maintain their household. Then, Islam also explains that divorce is allowed to be done, yet if the divorce is motivated by unlawful causes thus it is explained that the divorce is not good and that it is not allowed by God (it angers God)⁴.

Divorce can be done if it brings benefits, which may happen if the many solutions posed to the conflicting married couple cannot result to peace. In this condition, divorce can become an alternative which educates the two parties. The rulings of Islam have given the freedom for every couple (husbands and wives) to consider their actions well beforehand, certainly within the corridors which may be taken responsibility for. This is because there is also some harm caused by the divorce which inflicts the life of the ex-husband, ex-wife, or the children. Yet, in certain cases, divorce can be a solution if those within the marriage are tortured and that the peace cannot be reached.⁵

This means that, the author argues that if a married couple faces some problems in their household, they should not lightly decide to end the marriage. Instead, they should try to find a better solution for the sake of not only the couple, but also the family and the children. Yet, if efforts have been made and that there are no other solutions apart from divorce, thus it may be done, though there needs to be some resolutions regarding the co-owned wealth and the co-owned debt.

In the analysis of marriage laws, we acknowledge the existence of co-owned wealth and pre-owned wealth. The two things pose different legal results if a divorce occurred, both caused by divorce or because of inheritance. In marriage, wealth does not obtain enough attention from the law experts, though it has a huge influence to the life of the separated couple, whether it is caused by divorce or death.⁶

Juridically, wealth in marriage is formally regulated by the Constitution No. 1 year 1974 regarding marriage and also in the KHI book I.

⁴ Ibid, hal. 104

⁵ Ibid, hal. 105

⁶ Ibid, hal. 131

These rulings are made to render clear the status of wealth in a marriage. These two rulings state that wealth in marriage are divided into two kinds, which are pre-owned wealth and co-owned wealth. These two types of wealth have different resulting laws if there occurs a breaking of marriage ties, both caused by divorce or by death.

In KHI, *harta asal* is called pre-owned wealth. The explanation regarding this can be seen in Article 87 paragraph 1. The definition of pre-owned wealth according to the Article is: *"The pre-owned wealth of each of the husband and wife are wealth which they own as presents or as inheritance, and are under the power of the individual so long as the parties do make a different decision in the ties of marriage."*

Meanwhile, according to the Constitution No.1 year 1974 regarding Marriage, on article 35 paragraph (2), it states that: *"The pre-owned wealth of each of the husband or wife and the wealth the individual receives as a gift or as an inheritance are under the power of each individual, so long as the parties do not decide otherwise."*

Then, the discussion regarding the co-owned wealth is regarding the wealth which are the ownership of both the husband and the wife after the marriage vows has been stated. The society calls this co-owned wealth as *harta gono-gini*. In the Indonesian society, *Harta gono-gini* clearly exists, though each area has its own terms and regulations. In Aceh, for example, it is called *Hareuta Sihareukat*. Meanwhile, in Bali, it is called *Druwe Gabro*.

The state of Indonesia has its own rulings regarding *harta gono-gini* (co-owned wealth) in marriage as written in the Constitution No.1 year 1974 regarding marriage. It is explained in chapter VII, articles 35, 36, and 37. In the article 35 paragraph (1), it is stated that the wealth earned during the marriage becomes co-owned wealth. Meanwhile, article 36 regulates the status of the wealth earned by each of the husband and the wife. Then, Article 37 states that if the marriage ties are broken by divorce or death, thus the co-owned wealth will be regulated according to its own laws.

Making a just decision regarding the case of the lawsuit for the co-owned wealth or *harta gono gini* isn't an impossible thing. It has been proven

by the many decisions made regarding the case of the co-owned wealth which are not pleaded for cassation nor appeal, which shows that both parties are satisfied with the decisions made. Even so, it does not exactly mean that there are absolutely no problems regarding the co-owned wealth. An example of the mentioned problem is if one of the parties is reluctant to act upon the legal decision made by the court voluntarily, meanwhile the opposing parties are unable to propose a plea of execution as they do not have the budget to do so.

The researcher obtained some information from the Vice Head of Sorolangun Religious Court, Jambi Religious High Court, named Drs. Herman Supriyadi, regarding this case. He mentioned that he has heard of someone's complaint where that person has reported to the court clerks that her ex-husband did not want to divide the co-owned wealth as decided by the court. Then, the court clerks explained that the court will undergo the execution after she has completed the requirements, which include paying for the down payment of the execution fees according to the decided amount.

The person said that at that time she did not have the budget to pay for the execution fees. Not even that, she said that she had difficulties paying for her daily needs, as she worked as a field worker and that the rest of her wealth was seized by her ex-husband. Then, since the solution which was given by the court clerks cannot be done, thus, she reported her ex-husband's actions of not complying with the court's decision to the police. Yet, the police officers advised that that report should be addressed to the court as the execution regarding a decision is within the power of the court, not the police.

The Vice Head of Sorolangun Religious Court, Jambi Religious High Court, named Drs. Herman Supriyadi, said that he cannot guarantee the truth regarding this story. Yet, if it is indeed true, thus her fate is indeed pitiful. She was confused on where she could report this case, as all ways met a dead end, yet she cannot pay for the court as her conditions do not support this action.

Another case is taken from the researcher's experience while undergoing a legal consultation. The client mentioned that there are 16 co-owned objects (*harta gono-gini*) which are now under the process of resistance divorce (*verzet*). Meanwhile, all co-owned wealth – both those

which are movable and non-movable assets in certificates or motorized vehicle certificates – are all under the name of the husband and they are all under the power of the husband.

Another case happened in Palangkaraya Religious Court, on Thursday, August 24th, 2017 at 8 a.m. Based on the order of the Vice Head of Palangkaraya Religious Court on July 25th, 2017, there has been an execution regarding the co-owned wealth in the hands of the Defendant regarding the plea of execution from the Plaintiff to the Palangkaraya Religious Court, based on the Palangkaraya Religious Court Decree No. 234/Pdt.G/2014/Pa.Plk, on December 22nd, 2014, which are uncompiled with by the parties voluntarily, though that decree has a final legal power.⁷ Meanwhile, the legal regulation's definition of co-owned wealth in the Book of Civil Law Constitution Article 119 is wealth obtained since the marriage vows are said. All wealth is co-owned by the husband and the wife so long as there are now alternative agreements in the marriage.

Meanwhile, in KHI, regarding the regulations of co-owned wealth as written in Article 1 letter e, it is written that the wealth in marriage or *sirqah* is the wealth obtained both individually or together while the couple is married. This article does not say that it is not affected by whose name that item is registered under.

Thus, what is regarded as interesting by the researcher is the cases regarding the co-owned wealth and co-owned wealth in a marriage. It is not yet often discussed in various literature, though in reality it exists in marriages and are owned and must be paid together also.

Based on the description of the background above, the research problems of this study are:

1. How are the judges' decisions regarding the division of co-owned wealth as observed from the legal and the just regulations as stated in the decree No. 0701/Pdt.G/2014/PA.Mlg.?

⁷ Sumber: pa-palangkaraya.go.id/eksekusi-perkara

2. How is the execution of the division of the co-owned wealth as regulated in the decree No. 0701/Pdt.G/2014/PA.Mlg.?
3. How is the execution of the division of co-owned debt if it is not yet decreed by the judges, meanwhile that co-owned debt exists?

B. Literature Review

1. The General Principle of Execution

Undergoing execution is the last process in the process of litigation in court.⁸ The decisions which already have a determined legal power or those which may be implemented beforehand (*uit voorbaar bij voorraad*) may be followed with an execution.⁹

The characteristics of decisions which are already permanent laws are as follows:

- a. The decision has been accepted by the two parties.
- b. There are no efforts of law done by both parties during a certain period.
- c. It has been decided by the final level of court/cassation.¹⁰

Not all legal decisions which already have the status of permanent law can be applied. The decisions may be executed if it is *condemnatoir* or that the decisions condemn the parties.¹¹

In the procedural law of the Religious Court, there are only two kinds of execution, which are:¹²

1. The execution which punishes one of the parties to pay a certain amount of fee¹³
2. A real execution which obliges a party to give in a certain item.¹⁴

⁸ Taufiq Hamami, *Kedudukan dan Eksistensi Peradilan Agama dalam Sistem Tata Hukum di Indonesia*, Alumni, Bandung, 2003, hlm. 237.

⁹ Retnowulan Soetantio & Iskandar Oeripkartawinata, *Hukum Acara Perdata dalam Teori dan Praktek*, Mandar Maju, Bandung, 1997, hlm. 129.

¹⁰ Taufiq Hamami, *Op.cit.*, hlm. 237.

¹¹ Retnowulan Soetantio & Iskandar Oeripkartawinata, *Op.cit.*, hlm. 129.

¹² Taufiq Hamami, *Op.cit.*, hlm. 243.

¹³ Pasal 109 HIR dan Pasal 208 RBg.

¹⁴ Pasal 1033 RV.

The Religious Court's decision on civil cases is always a form of order from the court to the losing party to do, to let go of, or to punish something. Thus, the verdict dictum has the character of punishing (*condemnatoir*) or it may create something (*constitutoir*). This decision may be executed voluntarily or by force.

2. Implementation of the Decision Principle

Some principles in implementing the decisions are as follows:¹⁵

- a. Apart from the execution of the decision *uit voorbaar bij voorraad* provision decision¹⁶, decision of peace¹⁷, and decisions based on the *Grose* act, court decisions have the power of permanent law.¹⁸
- b. The decisions are not made voluntarily¹⁹, even though there has been a warning from the Head of the Religious Court.
- c. The decision which includes the order of *condemnatoir* is a decision in which its order starts with the words to punish or to order.
- d. The execution under the rule of the Head of the Religious Court.²⁰ The court which has the power to undergo execution is the Religious Court which implements a decree or other appointed Religious Courts.

How to Implement an Execution

- a. The plea of execution is proposed to the court which made the first-level decision with the reason that the defendant did not implement the decision voluntarily;
- b. If the reasons given are strong enough, then the Head of the Court will make a decision on the granting of the execution proposal;
- c. The Head of the Court will also decide on a trial to warn and to call the parties which are involved in the case;

¹⁵ Musthofa, 2005, *Kepaniteraan Peradilan Agama*, Jakarta: Kencana

¹⁶ Pasal 180 (2) HIR/Pasal 191 (1) RBg

¹⁷ Pasal 180 (1) HIR/Pasal 191(1) RBg dan Pasal 54 Rv

¹⁸ Pasal 130 (2) HIR/Pasal 154 (2) RBg

¹⁹ Pasal 224 HIR/Pasal 258 Rbg

²⁰ Pasal 195 (1) HIR/Pasal 206 (1) RBg.

- d. Then, the respondent will be given a warning so as to undergo the decision voluntarily in the period of 8 (eight) days after the trial of warning;
- e. If within the period of the time decided, the defendant do not implement the decision voluntarily, thus there will be an implementation of execution;
- f. The Head of the Court will make a decision which orders the clerks and three witnesses to undergo the execution of the verdict;
- g. The clerks decide on the day of implementing the execution and the defendant of the execution are demanded to be present on the time decided in the place of execution. The officials related are also asked to be present to witness the execution;
- h. The execution implementation of the decision to hand in a certain item by giving the items of the execution defendant's, then they will be locked from the outside.

C. Review on Co-Owned Wealth

1. The Definition of Co-Owned Wealth

In Islam, co-owned wealth is identically *qiyas*-ed with *Syirkah abdan mufawwadhah* which means a partnership of power and unlimited partnership. What is meant by unlimited partnership in marriage is anything they earned during the marriage, which becomes co-owned wealth, except those in which they received as inheritance or a special gift for either the husband or the wife.²¹

Meanwhile, according to *fiqh munakahat*, co-owned wealth is the wealth gained by the husband and the wife through their efforts, either from the efforts of both of them, or even if only the husband works while the wife stays home to take care of the household and to take care of the children. Once they are tied in the vows of marriage as husband and wife, thus all of their belongings are regarded as co-owned, whether it is the wealth or the

²¹ Tihami, Sohari sahrani, 2009, *Fikih Munakahat: Kajian Fikih Lengkap*, Jakarta, hlm. 181

children. Thus, the definition of co-owned wealth is the wealth gained during a marriage, apart from presents or inheritance.

2. Co-Owned Wealth According to the Indonesian Positive Law

Co-owned wealth is regulated in the Constitution No. 1 year 1974 regarding Marriage on Chapter VII, Articles 35, 36, and 37. In Article 35 paragraph (1), it is explained that the wealth and items obtained during the marriage becomes co-owned wealth. Article 36 regulates the status of the wealth obtained by each of the husband and the wife. Meanwhile, Article 37 describes that if the marriage ties are broken by divorce or death, thus the co-owned wealth will be regulated according to the constitution.

Apart from the Articles above, it is also explained in the Civil Law (*KUH Perdata*) Article 119 regarding the definition of co-owned wealth. It is explained that since the marriage has been legally established, thus the husband and the wife's wealth are legally conjoint as a whole, so long as there are no decisions regarding this matter in the marriage agreement. Meanwhile, KHI regulates the co-owned wealth in Article 1 letter e, which explains that the wealth in the marriage or *sirqah* are the wealth which are gained both individually or as a couple so long as the marriage is still legitimate. This article does not consider under whose name that wealth is registered.

Co-owned wealth can have a physical form or it might not. Items which have a physical form include mobile assets or immobile assets and important documents. Non-physical things can be their rights and responsibilities.²² Regarding the co-owned wealth, the husband and the wife may act based on an agreement between them. For example, the wife cannot sell a house which is co-owned without the agreement of the husband.²³

Meanwhile, regarding the co-owned wealth of married couples where the husband has more than one wife, the co-owned wealth with each of the

²² Pasal 91 Kompilasi Hukum Islam (KHI)

²³ Pasal 36 ayat (1) UU no. 1 Tahun 1974 jo. Pasal 92 Kompilasi Hukum Islam.

wives are taken care of separately. The ownership of a husband with more than one wife's joint wealth starts from the vow of his second, third, or fourth marriage.²⁴ The division of the co-owned wealth is opened if in a marriage there occurs events as follows: a separation caused by death, by divorce, or by the decision of the court. The part owned by each of the divorced couple is half of the co-owned wealth.²⁵ If there occurs separation by death, thus half of the co-owned wealth will be possessed by the widow or widower.²⁶

If there is a dispute regarding the co-owned wealth, the resolution will be proposed to the Religious Court.²⁷ The dispute regarding co-owned wealth usually happens after the co-owned wealth is opened and one party, either the husband or the wife, takes control over the co-owned wealth and is reluctant to give in half of the wealth to the ex-partner.

In this research, it is explained that according to the decree of the affair No. 0701/Pdt.G/2014/PA.Mlg, each of the plaintiff and the defendant have the right to own half of the co-owned wealth after it has been subtracted by the co-owned debt. This means that there are no excuses for both parties to not comply with the execution of the wealth division, as the co-owned debt are divided between the two and that the debt must be paid before they receive their share of wealth

D. Review on Co-Owned Debt

1. The Definition of Co-Owned Debt

Prof. Subekti, SH. explains in his book which is entitled *Pokok-Pokok Hukum Perdata (The Principles of Civil Law)* on page 34 that there are two types of debt, which are *prive* debt (which is private) and *Gemeenschap* debt (which is communion, and is used for the sake of many). According to Subekti, the private debt is the responsibility of the husband or the wife who have that debt, and the first items which must be

²⁴ Pasal 94 Kompilasi Hukum Islam

²⁵ Pasal 97 Kompilasi Hukum Islam

²⁶ Pasal 96 ayat (1) Kompilasi Hukum Islam

²⁷ Pasal 88 Kompilasi Hukum Islam

confiscated are personal items. If there are no personal items or if the value of those items is not enough to cover the debt, thus co-owned items may be confiscated also. Then, for the *Gemeenschap* debt, the first items which must be confiscated are the co-owned items. If the value is not enough, then the personal items of the husband and the wife who made that debt may be confiscated also.

Co-owned debt is made under the co-agreement of the husband and wife, and are used for their sake (the debt is made by the husband with the approval of the wife and vice versa). It may also be called family debt.

It can happen if either the husband or the wife undergoes a debt agreement with the approval of his/her partner and is used for daily needs of the family; or if both of them agrees to make an agreement of debt with creditors, for example if they lend some money from the bank to fulfill their needs, for example to develop a business.

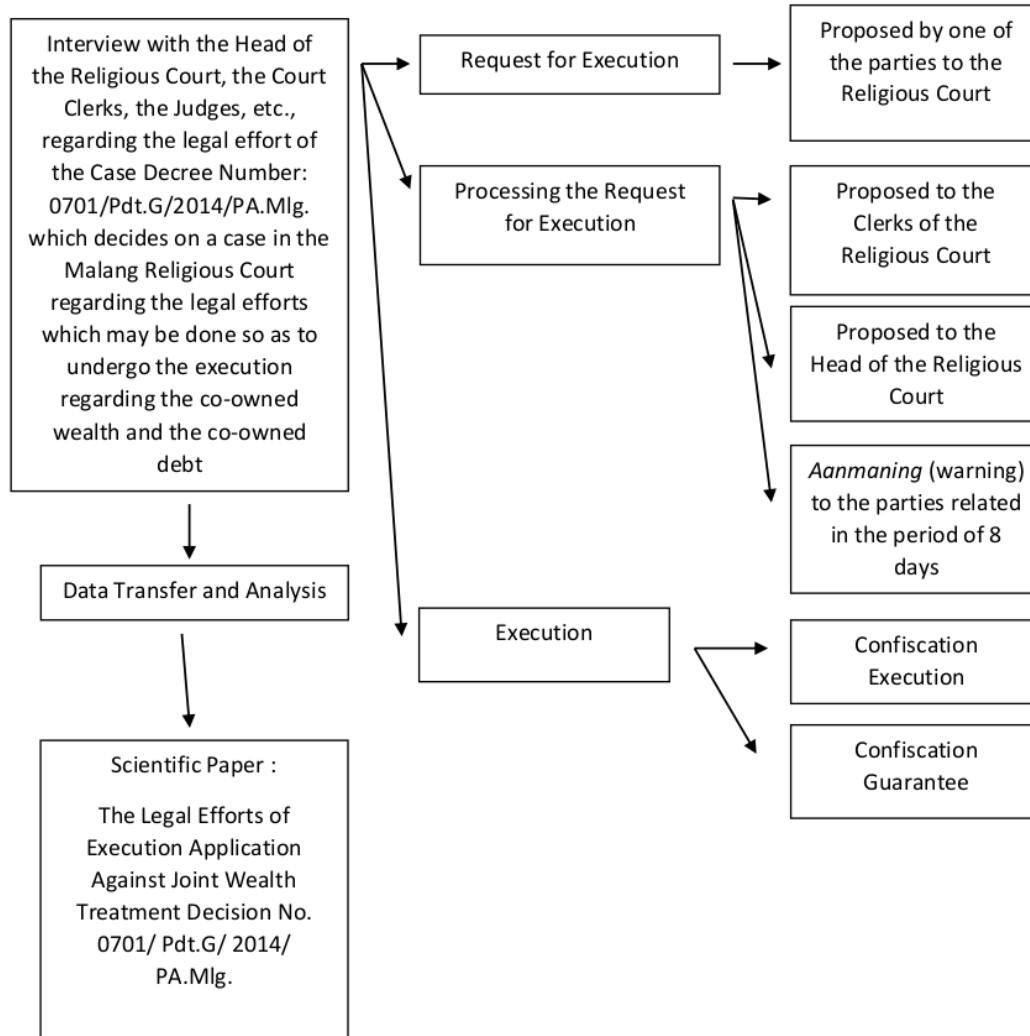
2. Co-Owned Debt According to the Indonesian Positive Law

As written in the Constitution No. 1 year 1974 regarding Marriage and also referring to the Book of Civil Law Constitution (*KUH Perdata*), the existing debt will be combined with communion wealth and are divided into two between the husband and the wife. Meanwhile, regarding the obligation to repay debt, a formula may be made. This formula will ease the calculation of wealth and debt divided. Before the communion wealth is divided, thus the debt must be repaid by each.

The Islamic Law Compilation Article 39 Paragraph (2) states that regarding the responsibility of debt, the debt which is taken for the sake of the family will be burdened to the communion wealth; Paragraph (3) states that if the co-owned wealth is not enough, thus it will be burdened to the wealth of the husband; Paragraph 4 states that if the husband does not have wealth or if it is not enough, thus it will be burdened to the wealth of the wife.

METHOD

A. Research Flow



B. Method of Approach

This research is a juridical empiric study. The research is conducted in the Religious Court of Malang, supported by the related legal documents and books. This type of research uses law in action – a living law which applies in the society. Considering that the researcher chooses to conduct a juridical empiric study, the main data used is primary data which are obtained from interviews with the Head of the Religious Court of Malang, the Clerks and

the Judges who inspect the case No. 0701 / Pdt.G / 2014 / PA.Mlg, with the aim of finding data about the execution law efforts regarding the case of co-owned wealth and co-owned debt which are discussed in this decision in the Religious Court of Malang (the decision regarding the co-owned wealth at the Religious Court which has a permanent law status). If the (ex-)husband or the (ex-)wife does not execute the decision regarding the co-owned wealth, meanwhile there exists a co-owned debt, thus what legal efforts may be done by the ex-wife, for example, to sue the ex-husband so as to make him want to repay the co-owned debt and to divide the co-owned wealth based on the decision of the Religious Court.

RESULTS AND DISCUSSION

A. The Judge's Decision Regarding Co-Owned Wealth if Reviewed from the Legal Certainty and Justice in the Decision No. 0701 / Pdt.G / 2014 / PA.Mlg

In one of the orders of the decision No. Nomor: 0701 / Pdt.G / 2014 / PA.Mlg, it is stated that, "*Decides that each of the Plaintiff and the Defender has the right to own half of the co-owned wealth after it has been subtracted by the co-owned debt.*"

What is stated in the Religious Court judge's order of decision is very clear. The parties related cannot avoid their obligation to repay their debt. If one or both parties refuse to repay their debt, whereas this decision has a permanent legal status (*inkracht*), thus it is mentioned in the order No.: 0701/Pdt.G/2014/PA.Mlg that, "*Determining the residual debt at Bank Muammalat Malang KPR Al-Musyarakah and Al-Murabahah Rumah at Jalan Perunggu Utara Q7 Malang as much as Rp 235.000.000 (two hundred and thirty-five million rupiah) is the co-owned debt of the Plaintiff and the Defender*".

For a couple where both the husband and the wife or only one of them -- like the husband, for example -- have a fixed income, then if the money is deposited to pay for mortgage, thus according to the Constitution, Article 35 paragraph (2) regarding Marriage, it is said that that house is a co-owned

wealth as the income of the husband was obtained during his marriage with his wife. Then, if there occurs a divorce after the credit has been paid, thus there are no legal cases within it, as according to Articles 96 and 97 of the Islamic Ruling Compilation (KHI) the wealth is equally shared between the husband and the wife.

Thus, regarding loans or credits used by married couples to have a house together, in which they profit from the results of that loan, it is implied that they have tied themselves with the loan agreements. Because of that, if there is a lateness or some obstacles in repaying the family debt, thus based on Article 39 of KHI, some co-owned items must first of all be confiscated. If it is not enough to repay the debt, then the husband's personal wealth will be confiscated. If it is not enough, it is followed by the confiscation of the wife's wealth.

Then, if either the husband or the wife files a resistance against the co-owned wealth which are confiscated to repay for the co-owned debt, it is surely unallowed, as the co-owned wealth is always a collateral to pay for the debt of the husband and the wife. And if it occurs during the marriage, it must be taken responsibility of together. What is meant by co-owned wealth as written in the Constitution No. 1 year 1974 Article 35 paragraph (1) regarding marriage by the Religious Court, it also includes co-owned debt which were taken during the marriage.

The Religious Court's decision No. 0701/Pdt.G/2014/PA.Mlg has an important sense that co-owned wealth are not only in the form of the things owned and the profit gained during the marriage (*aktiva*) or what is said to be a positive wealth, but it also includes the co-owned debt which happen during the marriage. It is in the form of *passiva* or negative wealth.

If the existing debt is unknown or unapproved by the partner, then it cannot be included as a family debt and the repayment is not burdened to the co-owned wealth, yet it is burdened to the personal wealth of the party which made the debt. The exception is it can be proven that whilst making the debt agreement, they are in the condition where they are unable to obtain approval from the partner, and that the debt is used for the sake of the family.

Based on the decision order No. 0701/Pdt.G/2014/PA.Mlg which says that “*Determining the residual debt at Bank Muammalat Malang KPR Al-Musyarakah and Al-Murabahah Rumah at Jalan Perunggu Utara Q7 Malang as much as Rp 235.000.000 (two hundred and thirty-five million rupiah) is the co-owned debt of the Plaintiff and the Defender*”, there are some options²⁸. First, in the form of compensation by returning some amount of the credit paid to the party which do not have the intention to continue the credit. Then that house will be owned by that whom continued the credit.

In this case, it can be assumed that if the amount agreed upon with the bank has a residual credit as much as Rp 235.000.000 (two hundred and thirty-five million rupiah), meanwhile the husband and the wife divorced, then the husband or the wife has the desire to own that house, apart from the obligation to continue the rest of the mortgage, he/she has the obligation to return half of the mortgage paid to the ex-partner who does not have the intention to continue the mortgage.

The second option, is by letting a third party take over the credit, and use the money from the third party to the ex-husband or the ex-wife with the same amount: half for the ex-wife, and half for the ex-husband. In this case, say the residual credit is Rp 235.000.000 (two hundred and thirty-five million rupiah), then the third party who bought the house has the responsibility to pay for the rest of the mortgage and to pay for the money paid by the ex-husband or the ex-wife. Then, the compensatory money becomes a co-owned wealth to be divided between the husband and the wife who divorced.

According to Gustav Randbruch, the law must contain three identifying values, which are:

1. The Certainty of Law Principle (*rechmatigheid*). This principle reviews from the juridical point of view.
2. The Justice of Law Principle (*gerechtigheit*). This principle reviews from the philosophical point of view, where justice means everyone has the same right in the court

²⁸ Vide Prof. Dr. H. Abdul Manan, SH.,S.IP., M.Hum, 2012, *Aneka masalah Hukum Perdata islam Di Indonesia*, Penerbit Kencana, Jakarta, hlm 128-129

3. The Utility of Law Principle (*utility*)²⁹

Based on the Certainty of Law Principle, there are two definitions, which are: (1) there are general regulations which make people know whether an action is right or wrong; (2) some legal protection for everyone from the freedom of the government is caused by general regulations. Everyone can know whatever the government does to a person. The certainty of law is not only contained in the constitutional articles, but there is also a consistency between the decision of one judge to another in the same and in the determined case.³⁰

In the legal justice point of view, the fact that there is an equal division of half and half between the husband and the wife in dividing the co-owned wealth is a constitutional regulation which must be complied with. Yet, in the point of view of social justice, the division of wealth does not have to be half and half. This is with the consideration of the constitution No. 1 year 1974 regarding Marriage, which regulates that, without seeing who is the breadwinner, the co-owned wealth must be divided into two. This is because usually the husband is the breadwinner, meanwhile the wife takes care of the wealth. Both of them have an equal position, even though they have different functions. Both of them have the same contribution in the process of collecting the wealth before the divorce happened. On the other hand, the judges must be able to understand the values which apply in the society, with the assumptions which happen in familial life, so that the judges can apply the law justly and which are agreed upon by both parties. As written in the Constitution No. 48 year 2009 Article 5 regarding the Judge's Power, it is said that, "Judges and constitutional judges must dig in, follow, and understand the legal values and the sense of justice which live within a society".

Practice of real independence (*praktische of feitelijk onafhankelijkheid*) is the independence of the judges to not be one-sided (*imparcial*). The judges must be updated with the development and the

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²⁹ Dwika, "Keadilan Dari Dimensi Sistem Hukum", (02/04/2011), diakses pada 10 November 2017.

³⁰ Petir Mahmud Marzuki, 2008, *Pengantar Ilmu Hukum*, Jakarta : Kencana Renada Media Grup, hlm 158

knowledge regarding the society through various media. Even so, the judges must not be influenced by them. It is feared that he/she may literally use the opinion of the media without further consideration. The judges must also analyze the urgent persuasions of the society to reconsider by using the existing regulations. He/she must know how far a judge may apply the social norms in the society.

Part of the order No. 0701/Pdt.G/2014/PA.Mlg states that, *“Punishing the Plaintiff or the Defendant to divide the co-owned wealth based on each of their share and if it cannot be divided naturally, it can be divided through an auction, and the proceeds are divided to the Plaintiff and the Defendant according to their share”*. It’s also stated in that order that what becomes the judges’ consideration includes the parties’ condition and ability to fulfill their responsibilities.

Based on an interview done by the author to the judge³¹ who decided on the case No. 0701/Pdt.G/2014/PA.Mlg. The Judge Assembly’s opinion regarding the case of No. 0701/Pdt.G/2014/PA.Mlg can already be studied from the perspective of law in an a quo case. Generally, the principles of justice and law certainty must be upheld. Justice must be upheld based on the Constitution No. 1 year 1974 Articles 35 until 37 regarding marriage, also based on the Islamic Law Compilation Articles 85 until 97 and others. Regarding the implementation of the order No. 0701/Pdt.G/2014/PA.Mlg, it is the responsibility of the Head of the Court and the Court clerks as the executive leaders. The judge assembly only have the competency to handle that case until the execution stage.

Based on the view regarding the independence of the judges’ power, what is meant by independence is not only the independence of the judge’s power from external powers in the stately organ, yet it also includes independence from other parties both outside of and inside the legal environment. This is because such influences may influence the order of the

³¹ Dra. Hj. Umami Kalsum Hs Lestahulu, M.H. NIP: 195407051988032001, wawancara dilakukan pada tanggal 17 September 2018, pukul 09.00 di kantor Pengadilan Agama Kota Malang.

law and justice, and it may make the judge's decisions unobjective as there are outside influences.

In the judge's consideration regarding the order No. 0701/Pdt.G/2014/PA.Mlg, it is stated that regarding co-owned wealth (*harta gono-gini*), it is absolute that both the Plaintiff and the Defendant have the same rights and responsibilities. This means that both parties have the same rights for the co-owned wealth, and they have the same responsibilities regarding the co-owned debt. Neither can avoid the responsibility of repaying the co-owned debt as it is their obligation. There are no excuses accepted, as it is for the justice of both parties.

B. Both Parties' Co-Owned Wealth Implementation in the Order No. 0701/Pdt.G/2014/PA.Mlg

In the order No. 0701/Pdt.G/2014/PA.Mlg, it is stated that, "*Punishing the Plaintiff or the Defendant to divide the co-owned wealth based on each of their share and if it cannot be divided naturally, it can be divided through an auction, and the proceeds are divided to the Plaintiff and the Defendant according to their share*".

Based on the order No. 0701/Pdt.G/2014/PA.Mlg, the Judge Assembly which are *inkracht* considers that until now, the co-owned wealth (*harta gono-gini*) has not been divided, and each party are still keeping it.

If the parties stay at their stance even though this decision has a permanent law status and that it has been active for around 4 years since the Judge Assembly of the Malang Religious Court has read the decision, thus the party which felt being treated unjustly may undergo some legal efforts.

The court decisions have three powers, which are:

1. The judges' decisions bind the litigation parties and other parties related in it, or what can be called binding power (*bindende kracht*).
2. The judge's decision which has obtained a permanent law status may be used as an evidence of the truth of something which is contained in it. This is usually called the evidence power (*bewijzende kracht*).

3. The power used to implement what is ordered in that decision forcefully by the state apparatus may be called execution power (*executoriale kracht*).

From the interview with the Judge Assembly, it is said that the execution of dividing the money or the other forms of wealth normatively only applies to the objects written in the decision order. Anything apart from that is the responsibility of the parties. If there still occur disputes regarding other objects which has not been decided upon and is wished to be resolved by the Court, thus there has to be a party which felt their rights aggrieved to file a new lawsuit to the Court.³²

There should not be any excuses of the parties to not execute their responsibilities in dividing the wealth which are the right of each party, and also the debt which are their responsibility. It has been clearly stated in the order No. 0701/Pdt.G/2014/PA.Mlg that, "*Determining the residual debt at Bank Muammalat Malang KPR Al-Musyarakah and Al-Murabahah Rumah at Jalan Perunggu Utara Q7 Malang as much as Rp 235.000.000 (two hundred and thirty-five million rupiah) is the co-owned debt of the Plaintiff and the Defender*" and that, "*Decides that each of the Plaintiff and the Defender has the right to own half of the co-owned wealth after it has been subtracted by the co-owned debt.*"

C. The Supporting or the Inhibiting Factors in Executing the Co-Owned Wealth Division in the Order No. 0701/Pdt.G/2014/PA.Mlg

In deciding upon a case, a judge must consider the juridical truth (law) and the philosophical truth (justice). A judge must make just and wise decisions by considering the implication of law and its influences in the society.

³² Dra. Hj. Ummi Kalsum Hs Lestahulu, M.H. NIP: 195407051988032001, wawancara dilakukan pada tanggal 17 September 2018, pukul 09.00 di kantor Pengadilan Agama Kota Malang.

Based on the author's interview with the Judge³³ who decided upon the case No. 0701/Pdt.G/2014/PA.Mlg, it is said that there is *ijtihad* in all cases, especially in making decisions, whether it is based on the regulations, jurisprudence, or doctrines – each one of them contain legal cases. The judge's freedom in determining the law is also part of *ijtihad*. Skill, knowledge, and attitude is gambled to determine the present law.

² In the consideration of the judge who handled the case No. 0701/Pdt.G/2014/PA.Mlg, the Judge Assembly has done an inspection on February 17th, 2015 and also through the Religious Court of Malang Regency on March 25th, 2015. From that inspection, they discovered the facts concerning the case as stated by the Plaintiff in the lawsuit regarding the co-owned wealth.

According to the researcher, it is clear that the condition of the co-owned wealth of the Plaintiff and the Defendant are the same as what was filed by the Plaintiff in the lawsuit and the evidences included. In the consideration of the judge, as all wealth are proven to be the co-owned wealth of the Plaintiff and the Defendant, thus the it may be granted.

² Based on the consideration of the judge of the order No. 701/Pdt.G/2014/PA.Mlg, the inhibiting factor is regarding the co-owned debt. It was stated that the amount of debt was Rp 202.244.770,- (two hundred and two million, two hundred and forty-four thousand, seven hundred and seventy rupiah) on March 2014, but factually, on February 2015, the amount of debt has increased to Rp 235.000.000,- (two hundred and thirty-five million rupiah). Thus the judges concluded that the rest of the co-owned debt is according to the Plaintiff's evidence, which is Rp 235.000.000,- (two hundred and thirty-five million rupiah).

Based on the author's interview with the judge³⁴ who handled this case, in the execution of the division of the debt which are unincluded in the Decision, the court cannot be involved. It is given back to the responsibility

³³ Dra. Hj. Ummi Kalsum Hs Lestahulu, M.H. NIP: 195407051988032001, wawancara dilakukan pada tanggal 17 September 2018, pukul 09.00 di kantor Pengadilan Agama Kota Malang.

³⁴ Dra. Hj. Ummi Kalsum Hs Lestahulu, M.H. NIP: 195407051988032001, wawancara dilakukan pada tanggal 17 September 2018, pukul 09.00 di kantor Pengadilan Agama Kota Malang.

of the parties. They decide on how the problem must be solved, without involving the court.

The effectivity of law can be recognized if we measure how far that law affects the target of law – whether or not it is complied with. Even so, even if it is said to be effective, all individuals may demand further regarding its degree of effectivity. This is because whether or not a person complies with the regulations, it depends on the level of interest.³⁵

In the opinion of the author, so that the order No. 0701/Pdt.G/2014/PA.Mlg can be implemented, especially that which concerns the co-owned wealth. In relation with the theory of effectivity explained above, it is stated that the level of a person's interest influences to what degree he/she will comply with it. Thus, there must be a retention to guarantee that the order will be complied with, especially that which concerns the co-owned wealth and the co-owned debt. The important points regarding the case should be described in a detailed manner in the order of the Religious Court.

The supporting and the inhibiting factors which influence how far the parties related comply with order of the Malang Religious Court No. 0701/Pdt.G/2014/PA.Mlg which already has a permanent law status are as follows:

1. The order does not mention the collateral for the parties to give in if they are negligent in implementing the orders regarding the co-owned wealth and the co-owned debt;
2. The third party, which is the company which manages the mortgage should also comply with, oblige, and implement the order read by the Judge Assembly which decides upon the case No. 0701/Pdt.G/2014/PA.Mlg which already has a permanent law status;
3. There are no sanctions giving to the authorized institutions to give punishments to the parties, enforcing them to act upon the order which said that, "*Determining the residual debt at Bank Muammalat Malang*

³⁵ Ahmad Ali, menguak teori Hukum (Legal Theory), dan Teori Peradilan (Judicialprudence) termasuk interpretasi undang-undang (Legis Prudence), Jakarta, Kencana, 2009, hlm 375

KPR Al-Musyarakah and Al-Murabahah Rumah at Jalan Perunggu Utara Q7 Malang as much as Rp 235.000.000 (two hundred and thirty-five million rupiah) is the co-owned debt of the Plaintiff and the Defender” and that, “Decides that each of the Plaintiff and the Defender has the right to own half of the co-owned wealth after it has been subtracted by the co-owned debt.”

CONCLUSION

The discussion above regarding the execution implementation of the co-owned debt in the order No. 0701/Pdt.G/2014/PA.Mlg, it can be concluded that basically, the principles of law justice and law certainty must be upheld. The law must be enforced as written in the Constitution No. 1 year 1974 Articles 35 until 37 regarding Marriage, the Compilation of Islamic Law (KHI) Articles 85 until 97, etc.

² Regarding the implementation of the order No. 0701/Pdt.G/2014/PA.Mlg, it is the responsibility of the Head of the Court and the Court Clerks as the executive leaders. The Judge Assembly only have the competency to handle that case until the level of decision-making. In the lawsuit of the co-owned wealth which is influenced by debt, the co-owned wealth is a positive asset, whereas the co-owned debt is a negative asset which must be taken responsibility for together.

The supporting and the inhibiting factors in the execution of debt division is not written in the Order. Thus, the court cannot be involved, and everything is on the hands of the parties. It is up to them on how they solve it. The court cannot be cancelled because of it, as the court has never inspected not made decisions about it.

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